

Mark Stein/R1/USEPA/US
06/07/2012 04:17 PM

To "Dona, Amy (ENRD)", Molly Cohen
cc Dawn Messier
bcc
Subject Re: Mt. Tom and Schiller



Mark A. Stein
U.S. Environmental Protection Agency
New England Region
5 Post Office Square - Suite 100 (ORA 18-1)
Boston, MA 02109-3912

Tel.: (617) 918-1077
E- Fax: (617) 918-0077

"Dona, Amy (ENRD)"

[Thanks, Mark. This made interesting reading...](#)

06/04/2012 05:40:38 PM

From: "Dona, Amy (ENRD)" <Amy.Dona@usdoj.gov>
To: Mark Stein/R1/USEPA/US@EPA
Cc: Dawn Messier/DC/USEPA/US@EPA
Date: 06/04/2012 05:40 PM
Subject: Re: Mt. Tom and Schiller



[Sent Using U.S. DOJ/ENRD BES 5 Server](#)

From: Mark Stein [mailto:Stein.Mark@epamail.epa.gov]
Sent: Monday, June 04, 2012 03:27 PM
To: Dona, Amy (ENRD)
Cc: Dawn Messier <Messier.Dawn@epamail.epa.gov>
Subject: Re: Mt. Tom and Schiller

Hi folks - FYI, see the article below from "Inside EPA."

Monday, June 04, 2012

KEY ISSUES: [Fracking](#) [Regional Haze](#) [CRT Exports](#) [FY13 Budget](#)

search...  [Advanced Search](#)

Daily News

Industry Appeal Reprises Failed Bid To Block EPA's Power Plant ELG

Posted: June 4, 2012

Power industry groups are signaling they plan to ask an appeals court to rule on whether EPA has a nondiscretionary duty to review and revise its existing effluent limitation guidelines (ELGs) for the sector, reprising legal arguments that failed to gain traction in a 2005 attempt to shape how EPA develops ELGs.

The Utility Water Act Group (UWAG) is appealing a March district court ruling that denied the group's effort to intervene in a consent decree between EPA and environmentalists setting deadlines for the agency to revise its 1982 ELG for the steam electric power generating sector.

In a [May 21 statement of issues](#) filed with the U.S. Court of Appeals for the District of Columbia Circuit, UWAG questioned EPA's discretion in revising the ELG.

Among those issues UWAG intends to raise on appeal are whether the Clean Water Act (CWA) imposes on EPA "the many 'nondiscretionary duties' that [environmentalists] allege EPA failed to perform," whether the facts support the assertion that EPA has not "reviewed existing effluent guidelines at stated intervals," whether UWAG was entitled to intervene on its behalf and if not, whether environmentalists "also lack standing to bring the suit in the first place."

The questions about EPA's discretion in reviewing ELGs echo issues considered by the 9th Circuit in two 2008 rulings. In *Natural Resources Defense Council, et al. v. EPA*, the 9th Circuit held that once the agency decides it will review a category of discharge for an ELG, it has a nondiscretionary duty to issue an ELG for that category within three years.

At the time of the ruling, EPA had been studying discharges from the power plant sector to see if revisions to the 1982 ELG were necessary, but EPA and other sources said the ruling only applied to new ELGs, not revisions to existing ones.

And in *Our Children's Earth Foundation (OCE) v. EPA*, the 9th Circuit initially ruled that EPA does not have wide discretion in how it implements the ELG requirements of the CWA, specifically with regard to the consideration of technology-based discharge requirements. But the 9th Circuit later withdrew that decision and in 2008 issued a revised ruling that said EPA has broad discretion to consider whatever factors it chose when reviewing ELG standards. Environmentalists [appealed the revised decision](#) to the Supreme Court but were not granted *certiorari*.

UWAG had also attempted to intervene in the *Our Children's Earth Foundation* case at the district court level, but the U.S. District Court for the Northern District of California in 2005 [rejected the group's motion](#), saying that other intervenors already represented the interests of

public utilities and private commercial companies. Sources said UWAG wanted to join the suit in order to ensure they had a seat at the table if EPA negotiated a settlement with environmentalists setting a new timetable for reviewing existing ELGs, such as the one for power plants.

Consent Order

In the pending D.C. Circuit Case, *Defenders of Wildlife, et al. v. EPA*, UWAG is challenging the district court's March 19 order entering the consent order between EPA and the environmental plaintiffs, which requires the agency to propose an ELG for the steam generating point source category by July 23 and finalize the rule by Jan. 31, 2014. The groups recently moved to push back those deadlines to Nov. 20 for the rule's proposal and April 28 for publication of the final rule.

Environmentalists following the case say UWAG's intent to question EPA's nondiscretionary duties is unlikely to gain traction in the D.C. Circuit, though it could come up again after the ELG is finalized.

Since UWAG's appeal is over the district court's decision to accept the consent order, rather than on the specific provisions of the ELG itself, the question of EPA's discretion is limited to whether the court has subject matter jurisdiction to hear the case in the first place, one environmentalist familiar with the litigation says.

That makes the argument significantly less likely to prevail, the source says, because the D.C. Circuit in 1994 ruled in *Best v. Kelly* that dismissal on subject matter jurisdiction is "reserved for complaints resting on truly fanciful factual allegations." While Defenders of Wildlife's argument that EPA has a nondiscretionary duty to revise the ELG for the steam generating point source category is based on a legal theory, the source says, "I think it will be very difficult for [UWAG's argument] to get traction."

UWAG representatives did not return calls for comment prior to press time.

The existing ELG for the steam generating point source category sets technology-based effluent standards for discharges emanating from any industrial activity that uses a steam-forced generator, and encompasses most coal, oil, natural gas and nuclear-fired power plants. The current ELG was first promulgated in 1982, and has not been revised since. In the meantime air pollution regulations have made flue gas desulfurization (FGD) units an almost universal installation for coal-fired plants. Those FGD units discharge water that is heavily laden with toxic chemicals, however, and so Defenders of Wildlife filed suit to force EPA to update the ELG to account for those discharges.

Environmentalists and the energy industry have been heavily invested in the outcome of the rule, since coal-fired plants are one of the most significant generators of certain types of air and water pollution. Coal ash impoundments have also been a major focus for environmentalists, who are pushing the agency to regulate coal ash as a hazardous waste under the Resource Conservation & Recovery Act.

Public Comment

Individual power plants that are subject to new National Pollutant Discharge Elimination System (NPDES) permits have also been the object of litigation and protracted public comment in recent months -- battles that are expected to foreshadow the agency's ELG rulemaking and litigation following its completion.

OCE and Sierra Club filed suit against EPA May 18 in the U.S. District Court for the District of Massachusetts, alleging that EPA's continuance of long-outdated permits for the Mt. Tom Station in Massachusetts and the Schiller Station in New Hampshire violate the CWA.

The law gives EPA the authority to use its best professional judgment (BPJ) to establish best available technology for meeting ELGs in the absence of a federal guide, the suit says. The plants both employ once-through cooling water systems and have not received revised ELG requirements for their FGD systems, the complaint says. Since EPA Region I -- which has permitting authority in Massachusetts and New Hampshire -- has issued revised NPDES permits for other plants using its BPJ with more stringent requirements than those required for the Mt. Tom and Schiller stations, the region should do the same for those stations, the suit argues.

"[R]enewed NPDES permits for Mt. Tom and Schiller Stations should have more stringent, water quality-based effluent limitations that would result in cleaner water and would reduce the harms to OCE's and Sierra Club's members that these facilities' discharges are causing," the complaint says. "EPA's ongoing inaction negatively impacts public health and increases exposure to pollutants in the Connecticut and Piscataqua Rivers by precluding the imposition of effluent limitations that reflect all of the water quality-based limitations required by [the] CWA."

The suit comes after EPA extended its comment period by five months late last year for a revised NPDES permit for the Merrimack Station in New Hampshire. That proposed permit addressed the station's ELG and cooling water intake structure requirements by requiring closed-loop cooling for part of the year and biological and chemical treatment of the station's FGD effluent. Several energy companies and UWAG said in their comments that the region's permit was based on faulty data and would be the subject of litigation if it were finalized as proposed (*Water Policy Report*, March 12). -- John Heltman (jheltman@iwpnews.com) This e-mail address is being protected from spambots. You need JavaScript enabled to view it)

Mark A. Stein
U.S. Environmental Protection Agency
New England Region
5 Post Office Square - Suite 100 (ORA 18-1)
Boston, MA 02109-3912

Tel.: (617) 918-1077
E- Fax: (617) 918-0077

